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IN THE

Supreme Court of the United States

October Term, 1967

No. 791

MORTON SOBELL,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR REHEARING ON DENIAL OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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The district court in its opinion, adopted by the Court of Appeals, noted that in deciding the present motion it also examined and considered all of the various post-trial applications made by the petitioner and his co-defendants. In the petition for a writ of certiorari the merits of the prior applications were not examined and, except in one instance, their relationship to the present application was not touched upon. Equally, the adequacy of the administration of our criminal law as applied to this case in the post-trial proceedings was not discussed although encompassed in the moving papers as part of the files and records of this case.

The sentencing court on an occasion stated that "judicial impartiality requires that the court be free from extraneous and conflicting pressures." *United States* v. *Sobell*, 142 F.Supp. 515. But an examination of the post-trial proceedings will reveal that one of the most important reasons why petitioner and his co-defendants had never been granted an evidentiary hearing and had been denied relief was that there were extraneous and conflicting pres-

sures bearing upon the administration of the federal criminal law and the courts in this " 'political' trial of this generation." 54 Col. L.R. 219 (1945). As stated in that note, entitled *The Rosenberg Case: Some Reflections on Federal Criminal Law*, the defendants were charged with having "transmitted the secrets of this destruction [the atomic bomb] to a foreign power. . . ." The subject of the note as there stated was:

> "This Note is concerned with how one of our institutions, the system of criminal law, functioned in an atmosphere of clashing ideologies and fearful expectations. More specifically the inquiry is whether federal criminal law and procedure were in fact adequate to dispense justice in the outstanding 'political' trial of this generation."

The note directed its attention to only one post-trial application—the application made on June 16, 1953 raising the question of the applicability of the Atomic Energy Act of 1946 and the contended impact of that statute upon the Espionage Act of 1917. On June 17, 1953 Mr. Justice Douglas issued a stay of execution of the death sentences and directed that the petitioners proceed in the district and appellate courts in that he felt that a substantial question had been raised and he had serious doubts whether the law as then prevailing would permit the imposition of the death sentence unless a jury recommends it and finds an intent to injure the United States.

For the first time in its history at the request of the Attorney General and for extra-legal reasons the Court was asked to reconvene for a special term to vacate the stay of execution. The Court reconvened on June 18, 1953, directed that argument immediately be held and the next morning vacated the stay of execution although three members of this Court were convinced that there was a substantial question and the execution should be stayed, and

whether the Court had the power to vacate the stay. *United States* v. *Rosenberg*, 346 U.S. 273, 292-293. While millions of people in this country and throughout the world joined by statesmen and religious leaders were calling for a stay of execution and a re-examination of the entire case as well, and their numbers were growing day by day,* the President deemed it necessary to make a statement he believed to be true in justification of his action in denying executive clemency. He stated in part:

> "The execution of two human beings is a grave matter but even graver is the thought of the millions of dead whose deaths may be directly attributable to what these spies have done." **

We now know the President was misled.

In looking to the events of the week of June 15, 1953 the Columbia Law Review note previously cited found:

> "The inevitable conclusion is that in this last stage of an extraordinarily protracted litigation, the rights of the Rosenbergs did not receive the precise and extensive consideration that must characterize the administration of the criminal law. Whether the Rosenbergs were in fact guilty is beside the point. In the vindication of their rights they were entitled to the equality of treatment afforded by the technical safeguards of the law." (p. 260)

Since that article was written in 1954 there have been other post-trial proceedings and we believe their disposition would only enforce such a conclusion. The answer to the basic question is that insofar as this case is concerned the system of criminal law and its administration

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* A consideration which undoubtedly impelled the government to ask the Court to reconvene in that it may not have been possible, in view of world opinion, to have attempted to carry out the death sentence in the Fall of 1953.

** New York Times, June 20, 1953.

has not in fact been adequate to dispense justice in the "'political' trial of this generation" and neither petitioner nor the Rosenbergs received the precise and extensive consideration or quality of treatment to which they were entitled under the law.

The Court, by declining to review this case at any time, forecloses judicial vindication to the petitioner and his co-defendants. Thus petitioner is denied any opportunity to establish that he did not receive a fair trial and that the very heart of the case upon which the conviction rested and which impelled the imposition and carrying out of the severest sentences was in fact false. Until the present 2255 motion the myth of the delivery of the bomb to the Soviet Union, said to have been encompassed in Exhibit 8 as described by Greenglass, prevailed and affected the entire proceedings including each and every one of the post-trial applications.

Without going into a detailed review of all of the post-trial applications it can be fairly stated that in most instances the applications for relief were not denied on the grounds that there was no merit but primarily that the issues were not timely raised and thus the judgment of conviction could not be subject to collateral attack. Nevertheless some of the conduct of the prosecution raised in the prior applications warrants consideration in this petition for rehearing; in that the present motion is directed toward the flagrant abuse of power and disregard of the responsibilities of a representative of the United States in a criminal prosecution.

In the course of the trial the prosecution unsealed the indictment of one William Pearl whose name was on the list of witnesses presented to the defense just prior to the trial. The indictment was made public and statements were made by the prosecution to the press that Pearl had been indicted for perjury in denying any personal association with the "atomic spies", a term which encompassed

the petitioner as well as the Rosenbergs and was so disseminated in the press. When the matter came up in court out of the presence of the jury there were some discussions had off the record; and defense counsel, as alleged in the first 2255 motion, was advised by the prosecution that the unsealing of the indictment was not done intentionally or timed to influence either the climate or the jury.* Upon that representation the defense did not move for a mistrial. The Court of Appeals in its opinion affirming the denial of an evidentiary hearing acknowledged that such conduct if done intentionally constituted tactics which could not be "too severely condemned." *United States* v. *Rosenberg,* 200 F. 2d 666, 670. The Court also found that such clear prosecution misconduct would have entitled petitioner and his co-defendant to a mistrial but that the motives of the prosecution were irrelevant regardless of the extent of its impact on the jury, and that the defendants had waived their right to collaterally attack the conviction on that ground.

In 1962 petitioner moved for relief, one of the grounds being founded upon this Court's decision in *Grunewald* v. *United States,* 353 U.S. 391. Ethel Rosenberg, after giving her direct testimony, was subject to a grossly unfair cross-examination by the prosecution. She had, in appearing before the grand jury, invoked her Fifth Amendment privilege in response to all questions posed. In her direct testimony she answered questions on the same subject matter. The prosecution assiduously brought out the prior invocations of the privilege not merely as an attack upon her credibility but as proof of her guilt; that now having been indicted she was willing to perjure herself to avoid the conviction she deserved. Both Julius and Ethel Rosenberg were asked questions as to their political affiliations while on the stand and in both instances asserted their privilege. The prosecution did not wish to press the point in that it

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* We do not here discuss the climate created by the prosecution prior to the trial, a ground tendered after trial and ruled untimely.

had already implanted in the minds of the jury that the assertion of the privilege was equivalent to an acknowledgment of guilt. Little wonder that the petitioner's counsel advised him not to take the stand in view of the paucity of the evidence against him when he would have been subject to a political inquisition. Under the theory of proving intent the prosecution was equating Communist association with the crime of espionage.

The government acknowledged in argument before the court of appeals that were Ethel Rosenberg alive and if the *Grunewald* policy were to be applied to her direct appeal from the judgment of conviction she would have been entitled to a new trial. The conspiracy nature of the case is such that it would mandate a new trial for all of the defendants. The Court of Appeals ruled that *Grunewald* did not reach such constitutional proportions as to be retroactive and since the issue had not been timely raised petitioner was not entitled to relief and in any event it would not enure to the benefit of petitioner in that his co-defendant was merely testifying, insofar as he was concerned, as a witness. The Court also held in its opinion that in any event the results would have been the same. This is hardly a ground to deny relief if the fault constitutes a denial of a fair trial.

The present 2255 motion and the proceedings subsequent to the unimpounding of Exhibit 8 and related testimony and the attack upon the alleged June 3, 1945 meeting and registration card went to the heart of the entire case and destroyed the myth of the alleged delivery of the bomb to the Soviet Union.

When one considers the acts of the prosecution—the unsealing of the Pearl indictment in the midst of the trial, the inexcusable, unfair cross-examination of Ethel Rosenberg, equating of the assertion of the privilege with a confession of guilt, along with the numerous false state-

ments made by the prosecution concerning Exhibit 8 and related testimony, the showing made in the present motion is further strengthened and enhanced as to the knowing use of false testimony and a forged document by fraud and prosecution misconduct. Yet the lower courts, as we previously pointed out, in their consideration of the present application failed to consider the unrefuted false statements made by the prosecution as to the alleged atom bomb theft, and that the prosecution was dedicated to obtaining a conviction by any means, fair or foul, whether warranted or not.

Both the government in its brief and the lower court in its opinion essentially disregarded in their review of the trial the basic charge of the theft of the bomb, and essentially conceded that the information allegedly transmitted might well have been of marginal, or no value. It was said that such facts are irrelevant in that the indictment itself did not require a finding of the successful theft and delivery of the Nagasaki bomb. They ignored the fact that the enormity of the charge and the fraud probably led to the conviction. It is almost equivalent to rereading the history of the Salem witchcraft trials and justifying the burning of a "witch" by pointing out that the indictment had alleged "casting an evil eye", for example, and that the label was irrelevant if there was some evidence of the overt act of looking.*

We have referred to extraneous and conflicting pressures and extra-legal considerations. What were some of them?—The fact that Fuchs had transmitted information to the Soviet Union unknown and undetected by the government; that at least one American undetected by us had been his courier; that this nation truly believed that it had a monopoly on atomic weapons and that the Soviet Union could not have independently developed their own by 1949 although this in fact was not so; that there was an anti-

* See *The Crucible* by Arthur Miller; *St. Joan* by George Bernard Shaw.

Communist hysteria abroad in this land and a senator from Wisconsin was claiming that our government was permeated by spies of left persuasion and in 1953 we had suffered "twenty years of treason"; and that the institutions of government as well as substantial portions of the public were led to equate Communism and espionage. All this led to the execution of the Rosenbergs and, once they were executed a desire to leave the matter untouched and forgotten. But it also left the petitioner in jail and neither he or untold others forgot or would let it be forgotten, whether the other parties to the proceedings wished it or not.

It is not an accident of history that the family of Colonel Dreyfus has appealed to this country in behalf of both the petitioner and his co-defendants. Nor is it a surprise that the sister of Bartolomeo Vanzetti has made similar application and that Warren K. Billings of the *Mooney-Billings* case has organized public support in this country in behalf of petitioner.

There have been cases in history where the courts afforded no judicial relief to those who were entitled to it. In the case of *Spies* v. *People,* 122 Ill. 1; *ex parte Spies and others,* 123 U.S. 131 (the Haymarket bombing), it was Governor Altgeld who granted relief when the courts had failed even though some of the defendants had already been executed. See Altgeld, *Reasons for Pardoning Fielden, Neebe and Schwab.* In the Mooney-Billings case 18 years after the conviction this Court in *Mooney* v. *Holohan,* 294 U.S. 103 advanced the cause of the fair administration of the criminal law in granting judicial relief where there is prosecution misconduct and remanded the matter to the courts of California with the direction that Mooney be afforded his remedies under the state writ. Here too judicial relief was denied although a hearing was held. (see *in re Mooney,* 10 Cal. 2d cert. den. 305 U.S. 598) and it was the intervention of Governor Olson of California who re-

viewed the case and found Mooney innocent that led to his release as well as the release of Warren K. Billings. It should be noted that the judicially imposed death sentence against Mooney was revoked by intervention of President Wilson.

In this case not only has there never been an evidentiary hearing granted, and no review by this Court of the fairness of the trial, but moreover the executive has refused to act. Indeed, the Pardon Board has, consistent with the request of the sentencing court, refused to parole the petitioner although he has been a model prisoner and long entitled to that relief.

We have set forth what has transpired in the past. Yet today the Department of Justice and its associated agencies, in spite of the sufficiency of the papers, vigorously oppose review by this Court and the consequent hazard of an evidentiary hearing. It does not do so because of its concern with the abuse of the Great Writ or the vague fallacious argument that the matter had been litigated before. It does so because it wishes silence and wishes to keep its files and records secret. It fears exposure of the truth. Otherwise the government would be saying "Let us have this hearing once and for all. Let us put to rest these unfounded claims." But these claims are not unfounded and there is the dilemma which is avoided by judicial abstention.

This Court has the option of granting certiorari upon this petition for rehearing which, it is respectfully submitted, would result in remanding the matter for an evidentiary hearing. The refusal to grant the petition for rehearing would in the alternative result in remanding this case to judicial oblivion and thus foreclose the utilization of our federal system of criminal law as an instrument to determine whether petitioner and his co-defendants received a fair trial or whether their conviction was a result of fraud and deception and prosecution misconduct. If the latter course is followed the petitioner must serve out his re-

maining time under a judgment of conviction which was unfairly obtained. But our Constitution and institutions created thereunder and in particular the administration of criminal justice will have been marred and stained, and no convenience of the moment can justify such a result. This case is ingrained in the minds of too many who will not forget or accept gross injustice. The case will then be a shameful page in our nation's history. The accusations here made are true and have as much merit as the "J'Accuse" in the *Dreyfus* case. France had the capacity to acknowledge error in a "political" case. Has our country less vigor?

As stated in a letter by the petitioner:

> "The debasement of justice which this case exemplifies is not an isolated, atypical aberration that only occurred during a moment of great stress and presumed national peril, and it cannot be assumed that it has no bearing on the present administration of justice. What an illusion! No miscarriages of justice, be they large or small, ever stand isolated from all other acts of a nation—and so long as a society is not willing to confess its errors of the past it will continue to find itself incapable of rising above the morass of the acknowledged and unacknowledged evils that engulf it."

The alternative paths are set forth. It is for this Court to decide. The right path is clear. The petition for rehearing should be granted and the writ of certiorari issued.

Respectfully submitted,

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Certification

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in the rules of this Court.

MARSHALL PERLIN,
One of the Attorney's for Petitioner.